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Letter dated 20 January 2004 from the Secretary-General addressed to the President of the Security Council

I am attaching for your consideration and for the consideration of the members of the Security Council a letter dated 13 January 2004 from the President of the International Criminal Tribunal for the Former Yugoslavia, Judge Theodor Meron.

In his letter, President Meron recalls that the current term of office of the permanent judges of the International Tribunal for the Former Yugoslavia will come to an end on 16 November 2005. He states that a considerable number of trials that are currently under way are likely to continue beyond that date, as are several that are due to start during the course of this year or early in 2005. He states that, if permanent judges adjudicating in those trials are not elected to a new term of office, there is a substantial risk that those trials will have to start anew, with a completely fresh team of judges. This would significantly impair the ability of the International Tribunal to implement its Completion Strategy, as set out in Security Council resolution 1503 (2003) of 28 August 2003.

President Meron goes on to state that the rules which are currently available to address this problem, and likewise the expedients and procedures which have hitherto been employed by the International Tribunal and by the Security Council and the General Assembly, are likely to prove insufficient to the task or else wasteful of financial and human resources.

President Meron further notes that the term of office of the ad litem judges of the International Tribunal will come to an end on 11 June 2005. He states that there are certain trials currently under way in which ad litem judges are adjudicating that are likely to continue beyond that date. He recalls in this connection that, under the Statute of the International Tribunal as it currently stands, ad litem judges are not eligible for re-election.

President Meron states that the judges of the International Tribunal wish to bring these difficulties to the attention of the Security Council for its consideration and possible action. He emphasizes that the judges do not wish to recommend any particular solution to these difficulties. Mention is made, however, of the possibility that the Security Council might decide to amend the Statute of the International Tribunal so as to extend the terms of office of both the current permanent judges and the current ad litem judges. President Meron also outlines two alternative ways in which the Security Council might decide to effect such as extension.

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I would be grateful if you could bring the present letter and its attachment to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

Annex

Letter dated 13 January 2004 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 addressed to the President of the Security Council

My fellow Judges have unanimously requested that I bring to your attention certain potential areas of improvement in the Tribunal's operation that, following our own internal discussion, we believe merit consideration by the Security Council.

As you may recall, by its resolution 1503 (28 August 2003), the Security Council called on the Tribunal to "take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010" (the "Completion Strategy"). In accordance with resolution 1503's direction that the Tribunal "take all possible measures" to meet the resolution's goals, the Judges of the Tribunal have discussed various steps that would ensure that trials take place with maximum efficiency. In the course of discussions, the implications of certain structural provisions of the Statute of the Tribunal have come to light.

Under the Statute of the Tribunal, the four-year term of the current permanent Judges of the Tribunal expires on 16 November 2005. The Statute then envisions an election for another four-year term of office, beginning 17 November 2005 and ending 16 November 2009. Past practice would suggest that the Secretary-General is likely to begin preparations for the election, including sending Governments the invitation for nominations, during the course of this year.

The approaching end of the mandate of Judges currently serving on the Tribunal raises serious concerns for trials that are likely to spill over from the current mandate into the next. A considerable number of ongoing trials, as well as several that will start in 2004 and early 2005, are unlikely to be concluded before 16 November 2005. If current Judges are not re-elected, there is a substantial risk that trials on which they are sitting will have to stop and start all over again with new Judges. Restarting and retrying long cases would be costly and wasteful and would make implementing the Completion Strategy highly unlikely. Of course, Rule 15 bis of the Rules of Procedure and Evidence allows two Judges to continue proceedings with a substitute Judge without the consent of the accused. However, because the substitute Judge must certify that he or she has familiarized himself or herself with the record of the proceedings — a provision that is not a mere formality but a requirement of fairness — Rule 15 bis cannot be used in cases in which a lengthy trial is significantly under way. Moreover, Rule 15 bis by its terms does not address the situation in which two Judges on the same case are not re-elected.

On occasion, when it was clear that the length of a trial was going to spill over into a new term, this problem was addressed by deferring assignment of Judges to the case in order to avoid the possibility that the trial would have to start over again if new Judges were elected. This method naturally delays trials that are ready to begin and slows the pace of the Tribunal's work. The option of the Council extending the mandate of individual Judges to finish a particular case is not an efficient one, as the new Judges elected in their place would take up their functions

and be remunerated but would not be able to start trials or other significant judicial work because of the lack of available courtrooms, offices and staff. The option of adopting a general rule akin to Article 13 (3) of the Statute of the International Court of Justice, pursuant to which Judges who are replaced nevertheless finish cases they have begun, likewise leaves the problem of cost-effective employment of newly elected Judges unresolved. Moreover, new Judges could only be employed in groups of three, the number necessary to form additional benches.

The situation is exacerbated in the case of ad litem Judges, as they cannot be re-elected at all. The mandate of all ad litem Judges is scheduled to expire on 11 June 2005. Certain major trials involving ad litem Judges are already likely to extend beyond that date. Such trials would automatically require the assignment of new Judges, again running the risk of having to start entire trials all over again. While the Council could choose to extend the mandate of individual ad litem Judges in particular cases or to permit ad litem Judges to run for re-election, a simpler option might be for the Council to extend the term of office of the ad litem Judges elected on 12 June 2001.

The holding of elections in 2005 as envisioned by the Statute is therefore likely to lead to delays in some cases and to a restarting of entire trials in others. In the view of the Judges of the Tribunal, action in early 2004 is needed to provide the Tribunal with the continuity, stability and certainty necessary for the efficient and effective planning of trials.

In the past two months, I have raised this matter informally with representatives of various Members of the Security Council in New York and at The Hague. Possible solutions to the problem were mentioned during those consultations. One suggested possibility was to extend the mandate of both permanent and ad litem Judges by a period coinciding with resolution 1503's target for the end of trials. Another suggestion was to institute a system whereby the mandate of Judges is automatically extended on a periodic basis (e.g., annually) unless the Security Council affirmatively decides to discontinue the extensions. The latter scheme would allow the Council an opportunity to assess the situation periodically.

Such extensions of the mandate of Judges could be accomplished through amendment of the Statute. Alternatively, and perhaps more simply, the Council could, acting under Chapter VII of the Charter, temporarily suspend the application of the relevant provisions of the Statute and adopt "transitional" arrangements for the composition of the Chambers during the Completion Strategy period.

The decision whether and how to address the implications of the electoral structure is a policy matter that rests with the Security Council. The Judges are therefore reticent to express a preference for either of the above options and merely note that both would address the concerns raised. The Council may well conceive of different measures that are equally responsive to the situation. We accordingly do not recommend a particular solution, but merely wish to bring the problem to the Council's attention for consideration and, if the Council deems appropriate, for timely action. In that context, the matter may also be brought to the attention of the General Assembly.

I and my colleagues at the Tribunal welcome the opportunity to consider ways in which to improve the efficiency of the Tribunal. We will continue to examine the

Tribunal's functioning and to seek out changes that will improve the Tribunal's ability to meet the goals set out in resolution 1503. Delays and interruptions in trial and appeals work must be avoided to the maximum extent possible in order for the Tribunal to implement the Completion Strategy and fulfil its historic mandate.

I remain, of course, ready and available to provide the Council with any additional clarifications.

(*Signed*) Theodor **Meron**